Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-2025

STERRITT TRUCKING INC. and
JAMES K. STERRITT,

Petitioners,

v

NATIONAL LABOR RELATIONS BOARD

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Table of Contents

	Page
Jurisdiction	1
Questions Presented for Review	2
Constitutional Provision and Statute Involved	2
Statement of the Case	4
Argument	6
Point I. The jurisdiction of a Court of Appeals under 29 U.S.C. § 160(e) (enforcement of an NLRB order) does not extend to the personal and unrelated assets of unnamed respondents	7
Point II. The imposition of a remedy foresworn by a prosecuting attorney is a deprivation of property without due process of law	7
Conclusion	8
APPENDIX:	
Order of Second Circuit Court of Appeals	A1
NLRB Motion for Contempt Adjudication	A5
Affidavit in Opposition to NLRB Motion	A12
Order of Reference to U.S. Magistrate	A18
Report of U.S. Magistrate	A20

Exceptions to U.S. Magistrate's Report A45

Excerpts from Transcript of Hearing A49

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, Amendment 5 2

National Labor Relations Act. Section 10(e),
29 U.S.C. § 160(e) 2

IN THE

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October Term, 1979

No.

STERRITT TRUCKING INC. and
JAMES K. STERRITT,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit to review its order adjudging Petitioners, as "Additional Respondents in Contempt," to be in civil contempt of its back pay order and providing other civil relief. No opinion was delivered by the court below.

Jurisdiction

The order of the United States Court of Appeals for the Second Circuit is dated March 25, 1980 and was entered on that day. No rehearing application was made. The jurisdiction of this Court is invoked under 29 U.S.C. § 160(e) and 28 U.S.C. §1254.

Questions Presented for Review

1. Whether the court below exceeded its jurisdiction in extending its contempt adjudication to the personal and unrelated assets of "additional respondents in contempt" who were not parties to the underlying proceeding.

2. Whether the imposition of an NLRB back-pay order on the personal and unrelated assets of a corporate and an individual "additional respondent in contempt" after a formal and recorded NLRB representation that it does not seek such payment from the individual is a deprivation of property without due process of law.

Constitutional Provision and Statute Involved

United States Constitution, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

National Labor Relations Act, Section 10(e), 29 U.S.C. § 160(e):

Petition to court for enforcement of order—Proceedings—Review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any

district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code [28 USCS § 2112]. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the

filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Statement of the Case

Pursuant to jurisdiction based on Section 10(e) of the National Labor Relations Act (29 U.S.C. §160e), the United States Court of Appeals entered orders in October 17, 1975 and December 30, 1976 enforcing an NLRB order requiring, *inter alia*, that James K. Sterritt, Inc. and Concrete Haulers, Inc. and their "officers, agents, successors, and assigns" pay backpay to and make pension fund payments on behalf of certain employees. Neither petitioner was a party to the proceedings. The primary respondents are bankrupt.

By its motion of August 31, 1977 (A-5),* the NLRB sought a civil contempt adjudication from the Court of Appeals and included petitioners, Sterritt Trucking, Inc. and James K. Sterritt, as "Additional Respondents in Contempt." By answering affidavit (A-12) respondents conceded that James K. Sterritt had control of the three corporations.

By its November 29, 1977 Order of Reference (A-18), the Court of Appeals referred the motion to U.S. Magistrate Bender Solomon for findings of fact, conclusions of law and

* (a-) refer to annexed Appendix)

recommendations. His Report (A-20) includes the proposed findings of the NLRB (A-28) and the proposed findings of respondents (A-37) marked by Magistrate Solomon. His "Not Found" marking with respect to the Order of Reference (A-38) was waived by petitioners during oral argument before the Court of Appeals. Respondents filed exceptions (A-45) which include the questions presented for review in this petition.

NLRB Attorney Charles P. Donnelly represented the NLRB in the hearing before Magistrate Solomon. In the course of that hearing and before respondents presented their cases, Mr. Donnelly made the following statement (A-49):

> I will make this representation to the court. The Board does not attempt to collect any portion of the back pay obligation from the personal property or assets of Mr. Sterritt, as an individual, as opposed to the corporations, except to the extent that it could be or has been or will be shown that the assets of any one of the corporations has been converted to the personal property of Mr. Sterritt, or in a manner such that any one of those corporations has suffered a depletion in its assets because of a conversion by Mr. Sterritt, if such has occurred or because of the removal by him of cash assets or anything else of value from any of the corporations. If it can be shown that something of value has been removed in that manner and now resides with him, personally, or has been converted by him for value, or otherwise to someone else, then those assets – the Board is taking the position those assets are reachable because they left a depletion in the value or worth of the corporation.

The contempt adjudication (A-1) does not deal with the "additional respondents in contempt" as "officer, agents, successors, and assigns" of the respondents in the enforcement proceedings. Rather, it imposes the enforcement proceedings on their personal and unrelated assets.

Petitioners have always and still do concede that they are "officers, agents, successors, and assigns" of the primary respondents in the enforcement proceedings, and that, only as such, they are subject to the jurisdiction of the Court of Appeals.

With a minor exception (see A-17), the attached appendix includes the entire Joint Appendix presented to the Court of Appeals on the NLRB's motion.

Argument

The imposition of an NLRB back pay order by a contempt adjudication order on the personal and unrelated assets of persons not bound by the order being enforced so far departs from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It also presents an issue of enormous importance to the judicial administration of the National Labor Relations Act. It will require all potential respondents to seek intervention in proceedings before the Board.

The imposition of the Court's mandate beyond the framework of "officers, agents, successors, and assigns" after the NLRB specifically assured petitioners that it did not intend to seek such a remedy is a classic denial of due process. The potential for such abuse would make it impossible for respondents to deal rationally with the NLRB. The anxiety of potential respondents would cripple NLRB administration of unfair labor practice proceedings.

The NLRB order enforced by the Court of Appeals finds that the original respondents (James K. Sterritt, Inc., and Concrete Haulers, Inc.) and the corporate additional respondent in contempt (Sterritt Trucking, Inc.) constitute a single "employer" under the National Labor Relations Act and that the corporations are controlled by the individual

additional respondent in contempt. By adding petitioners as additional respondents in contempt, the NLRB correctly brings them within the scope of enforcement as "officers, agents, successors, and assigns." That status has never been denied or even resisted by petitioners. However, the use of the labor law concept of "employer" to extend primary liability for unfair labor practices is fundamentally unsound. The proposition speaks its own downfall.

POINT I

The jurisdiction of a Court of Appeals under 29 U.S.C. § 160(e) (enforcement of an NLRB order) does not extend to the personal and unrelated assets of unnamed respondents.

The NLRB is empowered by 29 U.S.C. § 160(e) to petition a Court of Appeals for the enforcement of its ordes subject to review by this Court. The repeated reference to "such person" in § 160(e) clearly limits jurisdiction to the named respondents in the unfair labor practice proceeding. Officers, agents, successors, and assigns can be and are naturally included within the terms "such person." Any further extension of the enforcement jurisdiction goes beyond the statutory grant of jurisdiction. Further, it is a violation of the fundamental rule of law, the bedrock of due process.

POINT II

The imposition of a remedy foresworn by a prosecuting attorney is a deprivation of property without due process of law.

The order proposed by the NLRB was adopted by Magistrate Solomon (A-20) and the Court of Appeals (A-1)

without substantial change. Petitioners were on notice from the outset of the hearing on the contempt motion that there was some potential that the NLRB's proposed order could be interpreted to impose on them a primary responsibility. That concern was dismissed when the NLRB attorney, specifically and on the record (A-49), represented "to the court" that the NLRB did not seek back pay enforcement from the personal assets of the individual petitioner. In context, it is clear that the NLRB representation was unequivocal and was made prior to the presentation of respondents' case to the Magistrate.

This issue has never been addressed by the NLRB except in oral argument before the Court of Appeals and recently by a threat of body attachment against the person of petitioner James K. Sterritt. We submit that these circumstances constitute a "trap" from which even a wary respondent has no escape. The "taking" without due process must be found unless an estoppel theory is used to avoid that constitutional issue.

Conclusion.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR F. McGINN, Jr.,
Attorney for Petitioners,
Office and Post Office Address,
41 State Street,
Albany, New York 12207
Telephone: (518) 436-7684.

APPENDIX

Order of Second Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

JAMES K. STERRITT, INC., AND CONCRETE HAULERS, INC.,
Respondents,

and

STERRIT TRUCKING, INC., AND JAMES K. STERRITT,
Additional Respondents.
in Contempt.

Nos. 75-4011
75-4044
76-4253
75-4011
76-4253

ORDER

The Court having considered its Special Master's Report, dated July 19, 1979, and the exceptions and briefs of the parties, and having heard argument on January 11, 1980, hereby approves and adopts the Master's proposed findings, conclusions of Law, and recommendations. Wherefore,

IT IS ORDERED and ADJUDGED that James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc. and James K. Sterritt (hereinafter collectively referred to as "respondents") and each of them, are in civil contempt of the Court's judgments of October 17, 1975 and December 30, 1976, and,

IT IS FURTHER ORDERED that they shall purge themselves of said contempt by:

(i) Fully complying with the backpay provisions of the

judgments of October 17, 1965 and December 30, 1976, by forthwith paying the discriminatees the amounts and making the contributions which the Court has found will make them whole for the loss of earnings suffered by reason of the discrimination against them, together with interest thereon. Said principal amounts, as set forth in the Special Master's Finding No. 2, are as follows:

a) Backpay:

Robert Quick	$10,028
Thomas Monteverde, Jr.	19,419
Edward Jordan, Jr.	11,842
Allen Finch	13,758
Paul D. Overbaugh	7,067
Albert Quick, Sr.	7,770
Frank K. Ruhnke	9,509

b) Contributions to the Teamsters' pension fund:

Robert Quick	$1,104
Thomas Monteverde, Jr.	1,151
Edward Jordan, Jr.	1,000
Allen Finch	1,030
Paul D. Overbaugh	912
Albert Quick, Sr.	709
Frank K. Ruhnke	713

(ii) Mailing to each "owner-operator" or other employee of James K. Sterritt, Inc., Concrete Haulers, Inc., and Sterritt Trucking, Inc., copies of a notice in the form prescribed by the Board and signed by them by an appropriate officer, and by James K. Sterritt individually, stating that the aforesaid respondents have been adjudged in civil contempt of the Court for violating and disobeying its judgments and that they will take the action in purgation ordered by the Court;

and further, immediately posting copies of said notice together with the contempt adjudication, in conspicuous places, including all places where notices to employees customarily are posted, for a period of 60 days; said notices and copies of the contempt adjudication to be maintained in clearly legible condition throughout such posting period and not altered, defaced, or covered by any other material.

(iii) Filing a sworn statement with the Clerk of this Court and mailing a copy thereof to the Director of the Board's Third Region, Buffalo, New York, within 15 days after the entry of the adjudication and again at the end of the posting period, showing what steps have been taken by the respondents to comply with the Court's purgation order; and

(iv) Paying to the Board all costs and expenses, including attorneys' salaries, incurred by the Board in the investigation, preparation, presentation, and final disposition of these proceedings. Said amounts unless agreed upon, shall be fixed by further order of the Court upon submission by the Board of a verified bill of costs, and, it is

FURTHER ORDERED that to assure compliance with the Court's judgments, the Court hereby assesses a prospective fine in the amount of $500 per day on the respondents jointly and severally so long as full compliance is not forthcoming; and, it is

ORDERED that upon a failure of the respondents to purge themselves of civil contempt, as herein ordered, the Court may issue attachment against Sterritt and any other person, officer, or agent responsible for noncompliance.

/s/ Thomas J. Meskill
Thomas J. Meskill

/s/ Amalya L. Kearse
Amalya L. Kearse,
Circuit Judges.

Dated: March 25, 1980

NLRB Motion for Contempt Adjudication

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

JAMES K. STERRITT, INC., AND
CONCRETE HAULERS, INC.,
Respondents,

and No. 76-4253

STERRITT TRUCKING, INC., AND
JAMES K. STERRITT,
Additional Respondents
in Contempt.

MOTION OF THE NATIONAL LABOR RELATIONS BOARD
FOR
ADJUDICATION IN CIVIL CONTEMPT AND FOR
OTHER CIVIL RELIEF

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

The National Labor Relations Board (hereafter, "the Board") respectfully moves the Court for an order adjudging James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc., and James K. Sterritt in civil contempt of this Court for having failed and refused, and continuing to fail and refuse, to comply with this Court's judgments of October 17, 1975 and December 30, 1976.

In support of its motion, the Board alleges as follows:

(a) On October 17, 1975, the Court enforced from the bench a December 16, 1976 order of the Board (reported at 215 NLRB 769) finding respondent Concrete Haulers, Inc. (hereafter, "CHI") was the alter ego of respondent James K. Sterritt, Inc. (hereafter, "JKS"), and that JKS and CHI (hereafter, "JKS/CHI") and additional respondent in contempt Sterritt Trucking, Inc. (hereafter, "STI") were all together a single employer within the meaning of the National Labor Relations Act (hereafter, "the Act") and were all effectively owned and controlled by James K. Sterritt, and, *inter alia*, ordered JKS/CHI, "its officers, agents, successors, and assigns" to:

> Offer to Alfred Finch, Albert Quick, Sr., Frank K. Ruhnke, Thomas F. Monteverde, Jr., Robert Quick, Edward Jordan, Jr., and Paul D. Overbaugh immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent jobs and make them whole in the manner set forth in the section of the Decision entitled, "The Remedy."

(b) On December 30, 1976, the Court entered a supplemental judgment enforcing a June 18, 1976 unreported supplemental order of the Board fixing the amounts of backpay due each of the aforesaid discriminatees and requireing that JKS/CHI, its officers, agents, successors, and assigns

> shall make whole each of the discriminatees named below by payment to each of them the amount set forth adjacent to his name, plus interest accrued at the rate of 6 percent per annum in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), until all backpay is paid, less the tax withholding required by Federal and state laws:

Robert Quick	$10,028
Thomas Monteverde, Jr.	19,419
Edward Jordan, Jr.	11,842
Allen Finch	13,758
Paul D. Overbaugh	7,067
Albert Quick, Sr.	7,770
Frank K. Ruhnke	9,509

In addition, the Court's order required the above-named respondents

> to pay, on behalf of Robert Quick, Thomas Monteverde, Jr., Edward Jordan, Jr., Allen Finch, Paul D. Overbaugh, Albert Quick, Sr., and Frank K. Ruhnke, the amounts hereafter set opposite their names to the Teamsters' pension fund:

Robert Quick	$1,104
Thomas Monteverde, Jr.	1,151
Edward Jordan, Jr.	1,000
Allen Finch	1,030
Paul D. Overbaugh	912
Albert Quick, Sr.	709
Frank K. Ruhnke	713

(c) The judgments referred to in paragraphs (a) and (b) above have been in full force and effect since their entry and at all times respondents have had notice and actual knowledge of their terms.

(d) As alleged above and at all times material herein, additional respondent in contempt James K. Sterritt (hereafter, "Sterritt") has been the principal owner, officer, director, and managing agent of JKS/CHI and STI. As such, he is responsible for the contumacious refusal to satisfy the aforestated backpay judgment.

(e) It was found by the Board in the underlying unfair labor practice proceedings that at all material times JKS/CHI

was engaged in interstate and instrastate trucking operations, for contract customers, from its terminal in West Coxsackie, New York and operated under Federal and state licenses and permits which were held by and assigned to additional respondent STI; and that STI existed, until the transfer of operations alleged below, solely for the purpose of holding said permits for the use of JKS/CHI, and the benefit of James K. Sterritt.

(f) At a time subsequent to the entry of the Court's initial judgment in October 1975, the exact date being unknown to the movant, Starritt ceased operating JKS/CHI and transferred the business, customers, and operations of JKS/CHI to STI, over which Sterritt continued to exercise control. Thereafter, STI continued the business of JKS/CHI, utilizing the licenses and permits which it previously held for the use of JKS/CHI. The foreseeable result of the aforesaid transfer was to continue the trucking operations of JKS/CHI by STI, an entity not expressly named as a respondent in either of the Court judgments against JKS/CHI, thereby creating a cloak behind which Sterritt attempted and still attempts to continue operations free of liability for compliance with the backpay provisions of the judgments quoted above. Since the aforesaid transfer, Sterritt has operated the business formerly conducted by JKS/CHI under various guises including the corporate structure provided by STI.

(g) As a continuation, alter ego, and successor of JKS/CHI, STI is, jointly and severally with JKS/CHI, responsible for satisfaction of the backpay liability fixed by the supplemental judgment of December 30, 1976.

(h) At all times since entry of the aforesaid judgments, respondents have contumaciously sought to avoid obedience to, and have contumaciously failed and refused to obey, the obligation to make whole the discriminatees named above in

subparagraphs (a) and (b) by refusing to pay them the backpay and making the contributions fixed by the Court in its judgment of December 30, 1976.

WHEREFORE, the Board respectfully prays as follows:

1. That the Court adjudge James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc., and James K. Sterritt and any other person or corporation found to be their successor or alter ego in civil contempt for violating and disobeying, and continuing to violate and disobey, the October 17, 1975 and December 30, 1976 judgments of this Court.

2. That upon such adjudication that the Court require James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc., and James K. Sterritt and any other person or corporation found to be their successor or alter ego to purge themselves of such contempt by:

(a) Fully complying with the backpay provisions of the judgments of October 17, 1975 and December 30, 1976, by forthwith paying the discriminatees the amounts and making the contributions which the Court has found will make them whole for the loss of earning suffered by reason of the discrimination against them, together with interest thereon;

(b) Mailing to each employee of James K. Sterritt, Inc., Concrete Haulers, Inc., and Sterritt Trucking, Inc., and any other person or corporation found to be their successor or alter ego a notice in the form prescribed by the Board and signed by James K. Sterritt stating that they have been adjudged in civil contempt of the Court for violating and disobeying its judgments and that they will take the action in purgation ordered by the Court; and further, immediately posting copies of said notice together with the contempt adjudication, in conspicuous places, including all places where

notices to employees customarily are posted, for a period of sixty (60) days; said notices and copies of the contempt adjudication to be maintained in clearly legible condition throughout such posting period and not altered, defaced, or covered by any other material;

(c) Filing a sworn statement with the Clerk of this Court and mailing a copy thereof to the Director of the Board's Third Region, Buffalo, New York within fifteen (15) days after the entry of the adjudication and again at the end of the posting period, showing what steps have been taken by the respondents to comply with the Court's purgation order;

(d) Paying to the Board all costs and expenses, including attorneys' salaries, incurred by the Board in the investigation, preparation, presentation, and final dispostion of these proceedings.

3. That in order to assure against further violation of the Court's judgments, the Court assess a substantial prospective fine, in an amount fixed by the Court, for each and every further violation of the judgment or of its purgation order.

4. That upon a failure of respondents to purge themselves of civil contempt, the Court issue attachment against Sterritt and any other person, officer, or agent responsible for non-compliance.

5. That the Court take such other and further action and grant such other and further relief as may be just, reasonable, and necessary to assure compliance with its judgments and as this proceeding in civil contempt may require.

NATIONAL LABOR RELATIONS BOARD

/s/ Paul Elkind

PAUL ELKIND
Assistant General Counsel
for Contempt Litigation

CHARLES P. DONNELLY
Attorney

Dated at Washington, D.C.
this 31st day of August 1977

Affidavit in Opposition to NLRB Motion

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JAMES K. STERRITT, INC., AND
CONCRETE HAULERS, INC., No. 76-4253
Respondents,

and

STERRITT TRUCKING, INC., AND
JAMES K. STERRITT,
Additional Respondents
in Contempt.

AFFIDAVIT IN OPPOSITION TO
MOTION OF THE NATIONAL LABOR RELATIONS BOARD
FOR
ADJUDICATION IN CIVIL CONTEMPT AND FOR
OTHER CIVIL RELIEF

To the Honorable, the Judges of the United States
Court of Appeals for the Second Circuit:

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

ARTHUR F. MC GINN, JR., being duly sworn, deposes and says that he is duly admitted to practice before this Court and makes this affidavit on knowledge and information gained

from representing James K. Sterritt, Inc. and Concrete Haulers, Inc. in proceedings before the National Labor Relations Board and some of the prior proceedings before this Court.

2. The alleged "Additional Respondents in Contempt" (Sterritt Trucking, Inc., and James K. Sterritt) have never been served as Respondents at any stage in these proceedings. Respondent asserts that Sterritt Trucking, Inc., during all times relating to these proceedings, held only trucking rights which were leased to the Respondents James K. Sterritt, Inc. and Concrete Haulers, Inc. Respondent concedes that James K. Sterritt, an individual, has always had control of the three corporations named above.

3. Respondents submit that James K. Sterritt, individually and Sterritt Trucking, Inc., have never used their positions of control over the Respondents James K. Sterritt, Inc. and Concrete Haulers, Inc., to thwart the relief sought by the Petitioner. Simply stated, the Respondents James K. Sterritt, Inc. and Concrete Haulers, Inc. are without funds to satisfy the judgment obtained by the Petitioner and, in no way, is this situation a result of any action on the part of Sterritt Trucking, Inc. or James K. Sterritt, individually.

4. Attached hereto and made a part of this application to dismiss Petitioner's motion is the September 13, 1977 affidavit of Jonathan P. Harvey.

WHEREFORE, your deponent respectfully requests that the motion of Petitioner be dismissed or, in the alternative, that it be referred to the United States District Court for the Northern District of New York for adjudication.

/s/ Arthur F. McGinn, Jr.
Arthur F. McGinn, Jr.

Sworn to before me this
14th day of September, 1977.

/s/ Elizabeth G. Shelford
Notary Public, State of New York

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this affidavit and the attached affidavit of Jonathan P. Harvey has this day been served by mail upon

Paul Elkind, Assistant General Counsel
for Contempt Litigation
National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D. C. 20250

Dated at Albany, New York
this 14th day of September,
1977

/s/ Arthur F. McGinn, Jr.
Arthur F. McGinn, Jr.

STATE OF NEW YORK)
COUNTY OF ALBANY) ss.:
CITY OF ALBANY)

JONATHAN P. HARVEY, being duly sworn, deposes and says:

1. I am an attorney and was retained by James K. Sterritt for the purpose of analyzing whether or not bankruptcy petitions should be filed on behalf of the respondents in an action entitled "National Labor Relations Board, Petitioner, against James K. Sterritt, Inc., and Concrete Haulers, Inc., Respondents."

2. That thereafter deponent made an analysis of the aforementioned respondents, had many conferences and discussions with James K. Sterritt and analyzed the Bankruptcy Act and Rules and the debtor and creditor law of the State of New York.

3. Based upon discussions with James K. Sterritt and information given to me by him, it appeared that both corporations were insolvent and had little or no equity in any assets whatsoever.

4. Furthermore, it was determined that certain taxes were due to the state government from the aforementioned corporations which had not been paid. Since there were virtually no assets to use to distribute to creditors, and based upon counsel's experience in bankruptcy proceedings, the cost of fees for the potential trustee, his attorney fees and the referee's salary and expense fund, it appeared to be a useless gesture to file bankruptcy for the two aforementioned corporations, since there was no intention to operate them in

the future and no good and sufficient reason existed to simply obtain discharges of corporations which were inoperative and defunct, merely to pay legal fees and court costs.

5. Preliminary schedules in bankruptcy have been prepared by deponent and deponent told Mr. Friend at the National Labor Relations Board in Buffalo. Furthermore, deponent had a number of conversations with Mr. Friend, including the offer to set up a meeting with Mr. Sterritt to discuss the insolvency of both of the respondents at the convenience of petitioner.

6. Deponent wrote a letter on March 22, 1977 to Mr. Friend, which letter was written subsequent to numerous conversations and meetings with Mr. Sterritt. I stated the then present posture of respondents. Deponent would be pleased to allow the appropriate representatives of petitioner to examine books and records when necessary, however petitioner's representatives chose not to have such a meeting.

7. Various remedies are available to petitioner and judgment creditors under the debtor and creditor law of the State of New York, as well as other statutes and it seemed unnecessary and a waste of the Bankruptcy Court's time to commence a bankruptcy proceeding for the sole purpose of staying the National Labor Relations Board from any action. Such a proceeding can, of course, be brought and in the event the Court deems it necessary, such a petition will be filed.

8. Deponent further wrote a letter to Mr. Thomas Seeler, Regional Director of the National Labor Relations Board on July 27, 1976 indicating that it would be pointless to file a petition in bankruptcy since there are no assets to be distributed to creditors. Deponent informed Mr. Seeler at that time

that deponent would be pleased to talk with Mr. Seeler or any other authorized representative.

9. Deponent states that it is not the intention of any respondent herein to willfully refuse to comply with any lawful order of the Court, however, the fact is that there are no assets with which the respondents could satisfy the judgment.

10. Deponent attached hereto [*] and makes a part hereof photostatic copies of U.C.C.-11 filing forms indicating various secured parties with the dates of perfection of their security interests.

/s/ Jonathan P. Harvey
JONATHAN P. HARVEY

Sworn to before me this
13th day of September, 1977.

/s/ Pamela J. McDonald
Notary Public, State of New York
My Commission expires: 3/30/78

*Omitted from Petition for Certiorari

Order of Reference to U.S. Magistrate

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v. Nos. 75-4044

JAMES K. STERRITT, INC., AND CONCRETE HAULERS, INC., 76-4253
Respondents,

and

STERRITT TRUCKING, INC., AND JAMES K. STERRITT,
Additional Respondents
in Contempt

ORDER OF REFERENCE

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 29th day of November, one thousand and nine hundred and seventy-seven.

Upon consideration of the motion made herein by counsel for the petitioner National Labor Relations Board by notice of motion dated August 31, 1977, to adjudge respondents James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc., and James K. Sterritt, in Civil Contempt, it is hereby ORDERED that the motion be referred to U.S. Magistrate Solomon Bender of the Norther District of New York to make

findings of fact and con- [sic] conclusions of law, and to report to the Court of Appeals with recommendations. The Federal Rules of Civil Procedure shall apply to these proceedings.

/s/ Sterry R. Waterman

/s/ Leonard P. Moore

/s/ Murray I. Gurfein

Report of U.S. Magistrate

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

JAMES K. STERRITT, INC., AND CONCRETE HAULERS, INC.,
Respondents,

Nos. 75-4044, 76-4253

—and—

STERRITT TRUCKING, INC. and JAMES K. STERRITT,
Additional Respondents in Contempt.

REPORT OF BENDER SOLOMON, UNITED STATES MAGISTRATE WITH RECOMMENDATIONS.

In an unfair labor practice case, the United States Court of Appeals for the Second Circuit, entered two judgments, one on October 17, 1975 and another on December 30, 1976 against James K. Sterritt, Inc. (hereafter JKS) and Concrete Haulers, Inc. (hereafter CHI) and their "officers, agents, successors and assigns". The 1975 judgment enforced the National Labor Relations Board's order against respondents, and required respondents, among other things, to make respondent discrimatees whole by paying certain back pay, adopted the

Board's finding that JKS and CHI were alter egos and that JKS and CHI and additional respondent in contempt Sterritt Trucking, Inc. (hereafter STI) were all together a single employer within the meaning of the National Labor Relations Act, and that all were effectively owned and controlled by additional respondent in contempt James K. Sterritt. The 1976 judgment enforced a supplemental order of the Board fixing the sums (not herein set forth because they are fully set forth in the findings of fact which I have made) which JKS/CHI "its officers, successors, agents and assigns" were required to pay as back pay to the discriminatees.

By motion returnable on September 20,, 1977, petitioner moved the Second Circuit Court of Appeals to adjudge respondents and additional respondents in contempt of the above mentioned two judgments for failing to pay the sums therein set forth. In their answer, respondents admit that James K. Sterritt, the individual, "has always had control of the three corporations named above", state as a defense that additional respondents are not subject to the court's jurisdiction because they were not served, and that respondent corporations JKS and CHI are without funds to satisfy the judgments. By order of the Second Circuit, the motion was referred to the undersigned as United States Magistrate "to make findings of fact and conclusions of law, and to report to the Court of Appeals with recommendations."

The parties finished their preliminaries in the early months of 1978, and by agreement, hearings commenced before me on September 12 and September 13, 1978.

The first issue presented by the parties is whether the court has jurisdiction in this proceeding over STI and Sterritt individually. This court's judgment of October 17, 1975 adopted the findings of the Board (215NLRB at 769) that:

"James K. Sterritt is the principal operating officer of JKS, CHI, and Sterritt Trucking Inc., hereinafter called STI. Mr. Sterritt is the president of JKS and STI and the general manager of CHI. He has effective control over the stock in all three corporations. STI Has interstate and intrastate operating authorities as a carrier which are possessed by neither JKS or CHI. The services furnished by JKS are furnished pursuant to the authority held by STI wich has no employees and itself performs no operations. On January 31, 1974, JKS ceased operations and the following day all the operations therefore conducted by JKS were conducted by CHI, which arrangement has continued at least to the point of the hearing. All payments from Span-crete for the services rendered by Sterritts enterprises are made through STI which prior to February 1, 1974, turned over all of the money to JKS and since February 1, 1974, to CHI. Sterritt through this period has been the sole operating authority of both JKS and CHI. The operations were conducted for the same customer using the same equipment out of the same terminals and using, with the exception of the Charging Parties herein, the same personnel. I find that JKS, STI, and CHI are all together a single employer within the meaning of the Act and the CHI is an alter ego of JKS."

The testimony before me brought this out again, and in addition to the admission in the answer to which I referred in the second paragraph herein, the testimony established that the individual manipulated the corporations as though they were part of himself. An example is his testimony that James K. Sterritt, Inc. was compelled to enter into a contract with the Truckers' union which caused it to raise its rates to the customer Span-Crete Northeast. (34 - 36*)

*Numbers in parentheses refer to pages of the record before me.

Thereupon Span-Crete notified STI that it had become noncompetitive and that Span-Crete would look for other haulers. STI notified everyone of its intention of going out of business. Sterritt individually approached the head of the union, a Mr. Robillotto, and after explaining what was going to happen, the union agreed to an adjusted contract which would enable Sterritt to operate with competitive tariffs. Thereupon, Sterritt individually created CHI, with which corporation the Union made the new contract, and thus Sterritt's operation continued with the same equipment, the same terminal, etc. This fact was brought out in the hearings before the Board's administrative law judge and is featured in his decision which was adopted by the Board and enforced by this court. There are other facts in the testimony before me which showed that Sterritt freely pierced the corporate veil whenever it suited his convenience. The result is that JKS, CHI and STI were interdependent corporations which constituted a single employer. STI existed solely to hold the licenses and had no drivers or employees of its own and was dependent, almost exclusively, on the services of JKS/CHI employees who were under the control of Sterritt individually. I find that the corporate respondents are a single enterprise and employer, and that STI, as the continuation of that enterprise, is along with the controlling stockholder, Sterritt himself, liable for the outstanding backpay debt.

The evidence described, plus other evidence in the record before me, plus the admission by STI and Sterritt and the named Corporation JKS and CHI in the answer that Sterritt individually always had control of the three corporations required my finding as did the Board and this court that JKS/CHI and STI were and are a single employer, *Radio Union* v. *Broadcast Serv.*, 380 U. S. 255, 256 (1965); it is proper to treat as one what nominally are more than one; *United States*

v. J.V. Williams Company, 498 F. 2d 414, 437 (2d Cir. 1974); *NLRB* v. *Deena Artware, Inc.* 361 U. S. 398, 402, 404. Where "corporations are not what they appear to be* * * but divisions or departments of a 'single enterprise' (*N.L.R.B.* v. *Deena Artware*, 361 U. S. 398, at page 402* * * jurisdiction over the affiliated corporation would exist in contempt proceedings." *N.L.R.B.* v. *Deena Artware*, 310 F. 2d 470 (6th Cir. 1962).

As to Sterritt individually, "a command to a corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." *Wilson* v. *U. S.* 121 U. S. 361, 376 (1911).

The second issue is respondents' plea that they lack financial ability to satisfy the backpay judgments. On this issue, respondents have the burden of establishing the defense by showing "categorically and in detail why they are unable to comply." *N.L.R.B. v. Trans Ocean Export Packing, Inc.* 473 F 2d at 616; (9th Cir. 1973).

Sterritt testified that on June 16, 1977, he and his dispatcher, one Peter Whipper entered into a partnership agreement to create a new entity S & W Transport Agents (98, 102). A firm called Monroe Contracting Equipment had come into the area and needed an agent to do trucking from a terminal. S & W became the agent. STI could not become an agent. The partnership hired owners of rigs to do the trucking for them. Monroe paid STI for the trucking done by the owners of rigs. Sterritt used 70% of the income to pay the owners of the rigs for their work, 15% was retained by STI

and used for office expense including the salary of a part time handyman, and a secretary (107), phone bills and electric bills, and the remaining 15% was given to S & W. From this money, Whipper and Sterritt were paid equally. For a six and one half month period from June 16, 1977 to December 31, 1977 both Whipper and Sterritt took $11,701. each. (Exhibit 7, 107 - 111). Income for the 1st six months of 1978 fell by 35%. (111). The partners therefore had approximately $15,000. to divide as income. Of course, STI retained similar amounts. These amounts ere available but none was paid to the discriminatees as backpay. I therefore must find that respondents have failed to show that their claim on inability defense is valid "categorically and in detail" and have failed to show that they are unable to comply.

I have marked appropriately the proposed findings and conclusions of the opposing parties and these findings plus this report constitute my findings of fact and conclusions of law for submission to the Second Circuit Court of Appeals.

I recommend that the court grant the motions and enter an order adjudging respondents James K. Sterritt, Inc., concrete Haulers, Inc., Sterritt Trucking INc. and James K. Sterritt in civil contempt for violating and disobeying, and continuing to violate and disobey the Court's judgments of October 17, 1975 and December 30, 1976.

I recommend, in purgation of their contempt.

(a) that the aforesaid respondents and any other person or corporation found to be their successor or alter ego be required to take the following affirmative action:

(i) Fully comply with the backpay provisions of the judgments of October 17, 1965 and December 30, 1976, by forthwith paying the discriminatees the amounts and making

the contributions which the Court has found will make them whole for the loss of earnings suffered by reason of the discrimination against them, together with interest thereon;

(ii) Mail to each "owner-operator" or other employee of James K. Sterritt, Inc., Concrete Haulers, Inc., and Sterritt Trucking, Inc., copies of a notice in the form prescribed by the Board and signed by them and by James K. Sterritt individually, stating that the aforesaid respondents have been adjudged in civil contempt of the Court for violating and disobeying its judgments and that they will take the action in purgation ordered by the court; and further, immediately post copies of said notice together with the contempt adjudication, in conspicuous places, including all places where notice to employees customarily are posted, for a period of 60 days; said notices and copies of the contempt adjudication to be maintained in clearly legible condition throughout such posting period and not altered, defaced, or covered by any other material;

(iii) File a sworn statement with the Clerk of this Court and mail a copy thereof to the Director of the Board's Third Region, Buffalo, New York within 15 days after the entry of the adjudication and again at the end of the posting period, showing that steps have been taken by the respondents to comply with the Court's purgation order; and

(iv) Pay to the Board all costs and expenses, including attorneys' salaries, incurred by the Board in the investigation, preparation, presentation, and final disposition of these proceedings.

(b) that in order to assure compliance with the Court's judgments, the Court assess a prospective fine in the amount of $500. per day so long as full compliance is not forthcoming.

(c) that upon a failure of respondents to purge themselves of civil contempt, the Court issue attachment against Sterritt and any other person, officer, or agent responsible for noncompliance.

(d) that the Court take such other and further action and grant such other and further relief as may be just, reasonable, and necessary to assure compliance with its judgments and as this proceeding in civil contempt may require.

Dated: July 19, 1979.

BENDER SOLOMON
U.S. MAGISTRATE N.D.N.Y.
112 STATE STREET,
ALBANY, NEW YORK 12207

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD
Petitioner,

v.

JAMES K. STERRITT, INC., AND
CONCRETE HAULERS, INC.,
Respondents,

Nos. 75-4044
76-4253

and

STERRIT TRUCKING, INC., AND
JAMES K. STERRITT,
Additional Respondents.
in Contempt.

ORDER

ON THE BOARD'S MOTION FOR ADJUDICATION
IN CIVIL CONTEMPT AND FOR OTHER CIVIL RELIEF

PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

To the Honorable Bender Solomon, United States
Magistrate for the Northern District of New York:

The National Labor Relations Board, petitioner herein, respectfully proposes that the Special Master make the following:

FINDINGS OF FACT

1. On October 17, 1975, the Court enforced from the bench a December 16, 1974 Decision and Order of the Board (reported

at 215 NLRB 769) finding that respondent Concrete Haulers, Inc. (hereafter, "CHI") was the alter ego of respondent James k. Sterritt, Inc., (hereafter, "JKS"), and that JKS and CHI (hereafter, "JKS/CHI") and additional respondent in contempt Sterritt Trucking, Inc. (hereafter, "STI") were all together a single employer within the meaning of the National Labor Relations Act (hereafter, "the Act") and were all effectively owned and controlled by additonal respondent in contempt James K. Sterritt. *Inter alia*, JKS/CHI, "its officers, agents, successors, and assigns" were ordered to:

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Offer to Alfred Finch, Albert Quick, Sr., Frank K. Ruhnke, Thomas F. Monteverde, Jr., Robert Quick, Edward Jordan, Jr., and Paul D. Overbaugh immediate and full reinstatement to their former jobs, or, if such jobs no longer exist, to substantially equivalent jobs and make them whole in the manner set forth in the section of the Board's Decision entitled, "The Remedy."

2. On December 30, 1976, the Court entered a supplemental judgment enforcing a June 18, 1976 unreported supplemental order of the Board fixing the amounts of backpay due each of the aforesaid discriminatees and requiring that JKS/CHI, its officers, agents, successors, and assigns

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make whole each of the discriminatees named below by payment to each of them the amount set forth adjacent to his name, plus interest accrued at the rate of 6 percent per annum in the manner prescribed in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), until all backpay is paid, less the tax withholding required by Federal and state laws:

Robert Quick	$10,028
Thomas Monteverde, Jr.	19,419
Edward Jordan, Jr.	11,842
Allen Finch	13,758
Paul D. Overbaugh	7,067
Albert Quick, Sr.	7,770
Frank K. Ruhnke	9,509

In addition, the Court's order required the above-named respondents

> to pay, on behalf of Robert Quick, Thomas Monteverde, Jr., Edward Jordan, Jr., Allen Finch, Paul D. Overbaugh, Albert Quick, Sr., and Frank K. Ruhnke, the amounts hereafter set opposite their names to the Teamsters' pension fund:

Robert Quick	$1,104
Thomas Monteverde, Jr.	1,151
Edward Jordan, Jr.	1,000
Allen Finch	1,030
Paul D. Overbaugh	912
Albert Quick, Sr.	709
Frank K. Ruhnke	713

3. On August 31, 1977, the National Labor Relations Board filed a motion in the Court of Appeals for an order adjudging James K. Sterritt, and any other person or corporation found to be their successor or alter ego, in civil contempt for violating and disobeying, and and continuing to violate and disobey, the October 17, 1965 and December 30, 1976 judgments of the Court of Appeals. Counsel for respondents filed an answer to the Board's motion denying that respondents were in contempt and averring that JKS/CHI lacked sufficient funds to satisfy the backpay judgments.

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4. By order of November 29, 1977, the Court of Appeals referred the motion to Bender Soloman, United States Magistrate for the Northern District of New York, to make findings of fact and conclusions of law, and to report to the Court of Appeals with recommendations.

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5. Evidence was taken on September 12, 1978; all of that evidence has been transcribed and with the exhibits, accompanies the present report.

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6. As found by the Board, at all times material herein, additional respondent in contempt James K. Sterritt (hereafter, "Sterritt") has been the principal owner, officer, director, and managing agent of JKS/CHI and STI. As such, he is responsible for the contumacious refusal to satisfy the aforestated backpay judgment.

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7. It was found by the Board in the underlying unfair labor practice proceedings that at all material times JKS/CHI was engaged in interestate and intrastate trucking operations, for contract customers, from its terminal in West Coxsackie, New York and operated under Interstate Commerce Commission (hereafter "ICC") and state licenses and permits which held by and assigned to additonal respondent in contempt STI; and that STI existed, while JKS/CHI was in active operation, solely for the purpose of holding said permits for the use of JKS/CHI, and for the benefit of James K. Sterritt, and that JKS/CHI and STI were all together a single employer.

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8. On about December 31, 1975, a date subsequent to the entry of the Court's initial judgment in October 1975, Sterritt ceased operating JKS/CHI, and thereafter utilized instead the services of "owner-operators" to perform the same transport services under the continuing licenses and authority possessed by STI, over which Sterritt continued to exercise dominant control. Thereafter, with one exception, Sterritt continued his business enterprise essentially unchanged, and continued to perform the same services for the same customers. The only change occurred in 1977, when STI sold its ICC interstate operating permit but continued to operate within the State of New York under its state licenses and permits. I find that STI is a single employer and enterprise with JKS/CHI under the control of James K. Sterritt.

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9. The aforesaid transfer of the operations of STI/CHI to owner-operators was in continuation of Sterritt's enterprise including that part of the enterprise known as STI. [Sterritt used and continues to use STI as a cloak behind which Sterritt attempted and still attempts to continue operations free of liability for compliance with the backpay provisions of the judgments quoted above.]

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10. As an integral part of the economic enterprise, and as a continuation, alter ego, and successor of JKS/CHI, STI is, jointly and severally with Sterritt and JKS/CHI, responsible for satisfaction of the backpay liability fixed by the supplemental judgment of December 30, 1976.

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11. Respondents have failed to establish financial inability to comply with the judgments. On the contrary, the integrated enterprise, particularly Sterritt and STI have diverted funds from the enterprise which could have and should have been allocated towards satisfaction of the judgment.

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12. At all times since entry of the aforesaid judgments, respondents have contumaciously sought to avoid obedience to, and have contumaciously failed and refused to obey, the obligation to make whole the discriminatees named above in Findings of Fact 1 and 2 by refusing to pay them the backpay and by refusing to make the contributions fixed by the Court in its judgment of December 30, 1976.

CONCLUSIONS OF LAW

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I. The Court has jurisdiction over respondents James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking, Inc., and James K. Sterritt, in this contempt proceeding.

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II. At all material times herein, James K. Sterritt was owner and principal officer of James K. Sterritt, Concrete Haulers, Inc., and Sterritt Trucking, Inc. As such James K. Sterritt is responsible for their disobedience of the Court's judgments.

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III. The Court's judgments of October 17, 1975, and December 30, 1976 have been in full force and effect since their entry, and at all material times respondents have had actual knowledge of their terms.

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IV. The refusal of respondents, described in findings of fact 6, and 12, to satisfy the outstanding backpay judgment constitute contumacious disobedience of those judgments. In order to deal with respondents' disobedience and to prevent continued disobedience, and adjudication of contempt against respondents, as well as the assessment of a prospective fine or other penalties including body attachment upon James K. Sterritt or any other responsible agent or agents, are appropriate.

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V. Accordingly, I recommend that the Court enter an order adjudging respondents James K. Sterritt, Inc., Concrete Haulers, Inc., Sterritt Trucking Inc. and James K. Sterritt in civil contempt for violating and disobeying, and continuing to violate and disobey the Court's judgments of October 17, 1975 and December 30, 1976.

VI. Furthermore, in purgation of their contempt, I recommend

(a) that the aforesaid respondents and any other person or corporation found to be their successor or alter ego be required to take the following affirmative action:

(i) Fully comply with the backpay provisions of the judgments of October 17, 1975 and December 30, 1976, by forthwith paying the discriminatees the amounts and making the contributions which the Court has found will make them whole for the loss of earnings suffered by reason of the discrimination against them, together with interest thereon;

(ii) Mail to each "owner-operator" or other employee of James K. Sterritt, Inc., Concrete Haulers, Inc., and Sterritt Trucking, Inc., copies of a notice in the form prescribed by the Board and signed by them and by James K. Sterritt individually, stating that the aforesaid respondents have been adjudged in civil contempt of the Court for violating and disobeying its judgments and that they will take the action in purgation ordered by the Court; and further, immediately post copies of said notice together with the contempt adjudication, in conspicuous places, including all places where notices to employees customarily are posted, for a period of sixty (60) days; said notices and copies of the contempt adjudication to be maintained in clearly legible condition throughout such posting period and not altered, defaced, or covered by any other material;

(iii) File a sworn statement with the Clerk of this Court and mailing a copy thereof to the Director of the Board's Third Region, Buffalo, New York within fifteen (15) days after the entry of the adjudication and again at the end of the posting period, showing what steps have been taken by the respondents to comply with the Court's purgation order; and

(iv) Pay to the Board all costs and expenses, including attorneys' salaries, incurred by the Board in the investigation, preparation, presentation, and final disposition of these proceedings.

(b) that in order to assure compliance with the Court's judgments, the Court assess a prospective fine in the amount of $500 per day so long as full compliance is not forthcoming.

(c) that upon a failure of respondents to purge themselves of civil contempt, the Court issue attachment against Sterritt and any other person, officer, or agent responsible for non-compliance.

(d) that the Court take such other and further action and grant such other and further relief as may be just, reasonable, and necessary to assure compliance with its judgments and as this proceeding in civil contempt may require.

Respectfully submitted

Paul Elkind

PAUL ELKIND,
Assistant General Counsel
for Contempt Litigation

CHARLES P. DONNELLY,
Attorney

Dated at Washington, D.C.
this 7th day of September 1978.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

-against-

Nos. 75-4044
76-4253

JAMES K. STERRITT, INC. and
CONCRETE HAULERS, INC.,
Respondents,

and

STERRITT TRUCKING, INC.
and JAMES K. STERRITT,
Additional
Respondents in
Contempt.

Before: BENDER SOLOMON, ESQ.
U.S. MAGISTRATE
SPECIAL MASTER

PROPOSED FINDINGS AND CONCLUSIONS

FACTS

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1. On October 17, 1975, the United States Court of Appeals for the Second Circuit entered its judgment (NLRB Ex. 11) enforcing the backpay order of the National Labor Relations Board (NLRB) against the respondents James K. Sterritt, Inc. (JKS) and Concrete Haulers, Inc. (CHI). On July 18, 1976, the NLRB issued Supplemental Order fixing the amounts of back pay. On December 30, 1976, the Court issued its Supplemental Order fixing the amounts to be paid by JKS and CHI.

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2. By petition dated August 31, 1977, the NLRB petitioned the Court that JKS and CHI be adjudged in contempt of the Court's judgments. That petition asked also that Sterritt Trucking, Inc. (STI) and James K. Sterritt be included in the proceedings as "Additional Respondents in Contempt."

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3. By Order of Reference dated November 29, 1977, the Court referred the Board's motion to U.S. Magistrate Bender Solomon as Special Master to make findings of fact and conclusions of law and to report to the Court of Appeals with Recommendations.

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4. A hearing on the motion was held before Judge Solomon in Albany, New York, on September 12 and 13, 1978.

5. The Supplementary Judgment is directed only against JKS, STI, "their officers, agents, successors and assigns. . . ." (NLRB Ex. 12).

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6. In 1965, James K. Sterritt became an employee of Spancrete Northeast, Inc. and leased to that company a truck which he drove in delivering pre-stressed concrete forms produced by Spancrete (Tr. 246).

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7. On April 1, 1969 (Tr. 184), JKS was formed to own and lease to Spancrete the trucks previously leased by James K. Sterritt and being driven by Spancrete employees (Tr. 247-48).

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8. STI was formed in May or June 1970 for the purpose of hauling orange juice from New Jersey to 13 northeastern states. STI owned 15 trucks which were driven by its own employees (TR. 250). This operation was continued until March 1973 when it was terminated as a "losing proposition" (Tr. 253).

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9. JKS continued to lease trucks to Spancrete and receive inquiries from the New York State Department of Transportation indicating that it should apply for authority to operate (Tr. 251) JKS applied (Tr. 15, 251) and found that it could not be a carrier and lease vehicles at the same time (Tr. 15, 21). Therefore, the application was withdrawn and an application was made by STI (Tr. 251).

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10. In 1970, STI obtained a temporary Department of Transportation (N.Y.) permit to haul for Spancrete and also obtained rights from the Interstate Commerce Commission to operate out of Pittsfield, Massachusetts (Tr. 252).

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11. When STI obtained the rights in 1970, JKS stopped leasing its trucks to Spancrete and leased them to STI which obtained a contract to haul for Spancrete. JKS never could or did have such a contract with Spancrete which did not want to lease vehicles any longer (Tr. 16). At this time, JKS employed drivers of the trucks (Tr. 17). STI had employee-drivers on the Tropicana operation (Tr. 250).

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12. To fulfill its contract with Spancrete, STI continued to lease trucks from JKS and, in varying numbers, from owner-operators (tr. 254-55, 259).

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13. In November, 1973, JKS "had to sign a contract with the local union which left . . . [it] no choice but to pass the burden along to our customers" (Tr. 267, Res. Ex. E and F).

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14. JKS received an increase in tariff from Spancrete but its delinquency on loan payments to Spancrete soon required that Spancrete "take back" the trailers which JKS had purchased through a loan from Spancrete (Tr. 268).

15. Mr. Sterritt approached the Union with respect to the JKS-Union agreement of November 1973 and

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> The result of those discussions were that we were to incorporate a new corporation that would give us a new contract that we would live with and survive with and we could go back to the shipper and produce a rate that was satisfactory to their tariffs. (Tr. 271).

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16. JKS ceased operations on January 1 1974 (Tr. 268, Res. Ex. G) and CHI immediately continued the same operation (Tr. 270) i.e., leasing vehicles to STI.

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17. CHI continued that business until the end of 1975 when it was forced to terminate operations because of its poor financial condition (tr. 272).

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18. After the termination of the CHI operation, STI continued to work under its contract only with Spancrete by using owner-operators exclusively (tr. 273-74, Res. Ex. H).

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19. On June 16, 1977, James K. Sterritt and a Mr. Whipper formed a partnership, S & W Transport Agents, to act as an agent for Monroe Contracting Equipment (Tr. 102-3). As a "carrier" STI could not act as such an agent

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(Tr. 103-4). S & W also tried to make a connection with Dallas & Mavis, another trucker. Although no such relationship actually came into being, the partnership, S & W, did perform agency services for STI.

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20. Instead a drawing a salary from STI, Mr. Sterritt received $11,250 from the partnership for the period of June 16, 1977 to December 31, 1977 (NLRB Ex. 7). For the period of July 1, 1976 to June 30, 1977, Mr. Sterritt received a salary of $20,234 from STI (NLRB Ex. 14).

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21. As the result of Income Tax Audit Changes made by the Internal Revenue Service (Res. Ex. D) the corrected taxable income of JKS (calendar years) were <u>losses</u> of

1969	$12,145
1970	26,825
1972	23,802
1972	32,527.

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22. James K. Sterritt has received funds (e.g. $5,000 check, NLRB Ex. 3) for the sale of CHI trucks (formerly JKS trucks) to Trecho Transport, Inc. (Tr. 276). About $10,000 more is due (Tr. 52). Such receipts were used for attorney's fees (Tr. 274-5), fuel bills (Tr. 277), payroll taxes, business taxes and fuel taxes (Tr. 277).

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23. On September 13, 1978, STI had $20,000 in accounts payable and $14,000 in receivables (tr. 280).

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24. Both JKS and CHI are without meaningful assets (Tr. 153).

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25. Respondents did not contest the NLRB back pay proceedings because of a lack of funds (Tr. 275).

CONCLUSIONS

NOT FOUND B.S. U.S. MAG

1. Respondents in Contempt were not parties to any of the proceedings leading up to this motion that they be held in contempt of the Court's judgments of October 17, 1975 and July 18, 1976.

NOT FOUND B.S. U.S. MAG

2. Respondents in Contempt are liable on this motion only if it is proven that they, as "officers, agents, successors and assigns" of the primary respondents, diverted or otherwise appropriated assets of the primary respondents to their own or other use.

NOT FOUND B.S. U.S. MAG

3. The Respondents in Contempt are so closely alligned with the primary respondents that they are "agents" of the primary respondents for all purposes of these proceedings.

NOT FOUND B.S. U.S. MAG

4. Respondents in Contempt have sustained their burden of proving that they have not diverted any of the assets of the primary respondents. What meager assets were available were and are more than used up for delinquent taxes and necessary attorney and legal fees.

NOT FOUND B.S. U.S. MAG

5. The primary respondents are one entity for all legal and practical purposes in these proceedings. They were conceived and they died in financial difficulty. There were no assets to be diverted.

NOT FOUND B.S. B.S. U.S. MAG

6. The motion of the National Labor Relations Board should, in all respects, be denied.

Dated: Albany, New York
November 20, 1978

Respectfully submitted,

ARTHUR F. MC GINN, JR., P.C.
Attorney for Respondents
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Exceptions to U.S. Magistrate's Report

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

-against-

NOS. 75-4044,
76-4253.

JAMES K. STERRITT, INC., and
CONCRETE HAULERS, INC.,
Respondents,

-and-

STERRITT TRUCKING, INC., and
JAMES K. STERRITT,
Additional Respondents
in Contempt

RESPONDENTS' EXCEPTIONS TO FINDINGS AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE BENDER SOLOMON

Respondents, by their attorney, Arthur F. McGinn, Jr., P.C., submit the following exceptions to the July 19, 1979 findings of fact, conclusions of law, report and recommendations of United States Magistrate Bender Solomon pursuant to this Court's November 29, 1977 Order of Reference:

1. With respect to the Petitioner's September 7, 1978 Proposed Findings of Fact and Conclusions of Law, respondents take exception to the following Findings of Fact:

(a) number 6 insofar as its finds that Respondent in Contempt James K. Sterritt is personally "responsible for the contumacious refusal to satisfy the aforestated backpay judgment."

(b) number 7 insofar as it finds that the NLRB found that STI existed, while JKS/CHI was in active operation, solely for the purpose of holding said permits for the use of JKS/CHI, and for the benefit of James K. Sterritt, and that JKS/CHI and STI were all together a single employer.

(c) number 9 insofar as it finds
Sterritt used and continues to use STI as a cloak behind which Sterritt attempted and still attempts to continue operations free of liability for compliance with the backpay provisions of the judgments quoted above.

(d) number 10 insofar as it finds that James K. Sterritt is personally responsible for the satisfaction of the backpay liability.

(e) number 11 insofar as it finds that respondent corporations failed to establish inability to comply with the judgments and that funds have been diversted.

(f) number 12 insofar as it finds that respondents have been contumacious.

2. With respect to the petitioner's September 7, 1978 Proposed Findings of Fact and Conclusions of Law, respondents take exception to the following Conclusions of Law:

(a) number I insofar as it finds that the court has jurisdiction over Sterritt Trucking, Inc. and James K. Sterritt.

(b) number II insofar as it finds that James K. Sterritt is responsible for any disobedience of this Court's judgment.

(c) numbers IV and V insofar as they find that James K. Sterritt should be adjudicated in contempt, fined and penalized, including body attachment.

(d) number VI insofar as it applies to James K. Sterritt personally.

3. Exception is taken to the failure of U.S. Magistrate Bender Solomon to make findings with respect to the October 16, 1968 Amended Proposed Findings of Fact and Conclusions of Law submitted to him by the petitioner.

4. With respect to the Respondents' November 20, 1978 Proposed Findings and Conclusions, Respondents take exception to each fact and conclusion "NOT FOUND."

5. Without limitation of the foregoing exceptions, respondents take the following exceptions to the July 19, 1979 "Report of Bender Solomon, United States Magistrate With Recommendations":

(a) At page 1, the Report acknowledges that respondents have raised an issue with respect to this Court's jurisdiction and the Report fails adequately to address that issue.

(b) The finding at page 3 that James K. Sterritt "manipulated the corporations as though they were a part of himself."

(c) The findings at pages 3 and 4 and the conclusion that "Sterritt freely pierced the corporate veil whenever it suited his convenience" and that Sterritt is personally liable for the backpay debt.

(d) The findings at page 5 and 6 that amounts of money retained by Sterritt Trucking, Inc. were available to pay the backpay judgment and that respondents have failed to show categorically and in detail their inability to pay the judgment.

(e) The recommendations at pages 7 and 8 insofar as they apply to James K. Sterritt personally.

Albany, New York
October 11, 1979.

Respectfully submitted,

ARTHUR F. MC GINN, JR., P.C.
Attorney for Respondents

By Arthur F. McGinn, Jr.
Arthur F. McGinn, Jr.
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I certify that a copy of these Exceptions has this date been served upon Paul Elkind, Assistant General Counsel for Contempt Litigation, National Labor Relations Board, Office of the General Counsel, Washington, D.C. 20570 (Attention: Charles P. Donnelly, Attorney).

Arthur F. McGinn, Jr.

not absolutely stated, as he did off the record in this proceeding, that the National Labor Relations Board does not seek the personal funds of James K. Sterritt. I think the case they put in and the statement he made indicated that. He did state it off the record but I think that – especially since I have got to put in my case, that it should be stated for the record that you are not seeking the personal assets of James K. Sterritt.

MR. DONNELLY: I will make this representation to the court. The Board does not attempt to collect any portion of the back pay obligation from the personal property or assets of Mr. Sterritt, as an individual, as opposed to the corporations, except to the extent that it could be or has been or will be shown that the assets of any one of the corporations has been converted to the personal property of Mr. Sterritt, or in a manner such that any one of those corporations has suffered a depletion in its assets because of a conversion by Mr. Sterritt, if such has occurred or because of the removal by him of cash assets or anything else of value from any of the corporations. If it can be shown that something of value has been removed in that manner and now resides with him, personally, or has been converted by him for value, or otherwise to someone else, then those assets – the Board is taking the position those assets are reachable because they left a depletion in the value or worth of the corporation.

JUDGE SOLOMON: Is it your position, Mr. Donnelly, upon the evidence presented before, that you have established the fact that the individual did convert money from these corporations and did appropriate these moneys for his own personal use?

MR. DONNELLY: It has been established at least to this extent, that it was recited in the protective order filed by the Court of Appeals.

JUDGE SOLOMON: That's not before this court.

MR. DONNELLY: It sets out fully the Board's position on Mr. Sterritt's use of S & W Transport Agents. It appears from the record and the Board submits that while S & W Transport Agents were in existence, it was a partnership between Mr. Sterritt and his dispatcher, Mr. Whipper, they received 15 percent of the gross proceeds – the gross assets of Sterritt Trucking, Incorporated, out of which certain expenses were paid, such as the salary of a secretary and the wages of a handyman and some office expenses such as the telephone, utilities or electricity for Sterritt Trucking, and that the balance, or the remainder, after those expenses, were divided evenly between Mr. Whipper and Mr. Sterritt.

It's my position that – we suggest that signifies some important factors in this case. One, is that as to any claim of poverty by Sterritt Trucking, the fact that 15 percent of the gross proceeds being removed from the corporation, in itself, evidences that there was some cash available from the corporation to pay the back pay obligation.

Secondly, it's our position that any funds which have been so distributed by S & W Transport Agents are reachable by the court's judgment enforcing the back pay order of the Board, since it was established that those funds were divided between Mr. Sterritt and Mr. Whipper. If Mr. Sterritt has any such funds, they should be available to satisfy this obligation because they were the corporate funds of Sterritt Trucking, Incorporated. In essence, what has happened is simply that Mr. Sterritt has been paying himself a salary by taking out 15

percent and dividing it with Mr. Whipper and, as such, that represents nothing more than his putting money in the corporation which is thrown back to him as a salary, or whatever you call it, as a payment to him. The court did not establish anything else. That means it's available, at least to assist in the payment of this obligation and this is not an impoverished corporation. There was money there and the judgment should be able to reach some of that to help satisfy this obligation.

MR. McGINN: I understand what he said, but I would like to get a clarification. Is it the Board's position that Mr. Sterritt, personally, is not entitled to take a salary from this enterprise?

MR. DONNELLY: The Board doesn't take any position on what Mr. Sterritt, as an individual, is entitled to receive out of the corporation. The Board objects to the extent that you implied you didn't have any money and the fact that 15 percent of the corporation's gross receipts have been taken out of it, indicates you do have money and it's, as such, available.

MR. McGINN: Mr. Donnelly, are there any other instances that you looked to Mr. Sterritt, personally, that you can think of, in this record?

MR. DONNELLY: I, frankly, as of this point, cannot.

MR. McGINN: I don't either, frankly.

JUDGE SOLOMON: We'll adjourn for lunch 'til 2:00 p.m.

(A luncheon recess was taken from 1:00 to 2:00 p.m.)

AFTERNOON SESSION

(A letter dated September 12, 1974 on the letterhead of the Internal Revenue Service to James K. Sterritt, Incorporated was marked as Respondent's Exhibit D for identification, this date.)

(A letter dated September 5, 1973 on the letterhead of Spancrete Northeast, Incorporated, addressed to Mr. James K. Sterritt, was marked as Respondent's Exhibit E for identification, this date.)

(A letter dated December 17, 1973 on the letterhead of Sterritt Trucking, Incorporated, addressed to Mr. Howard Blosser, President, from James K. Sterritt was marked as Respondent's Exhibit F for identification, this date.)

(A letter dated January 14, 1974 on the letterhead of James K. Sterritt, Incorporated, addressed to Mr. Howard Blosser, President, was marked Respondent's Exhibit G for identification, this date.)

(A letter dated November 24, 1975 on the letterhead of James K. Sterritt, addressed to Mr. Howard Nelson, President, was marked Respondent's Exhibit H for identification, this date.)

JUDGE SOLOMON: Mr. McGinn, you have offered certain documents for presentation, as part of your case.

MR. McGINN: No, Your Honor.

JUDGE SOLOMON: Off the record. (A discussion was had off the record.)

MR. McGINN: Your Honor, I simply had the stenographer mark them. As I go along, I will be putting them in, with the testimony.

JUDGE SOLOMON: Now, the record will show Mr. Sterritt is the witness who is presently going to testify on behalf of the respondent, having been called by his attorney, Mr. McGinn. The witness, having been previously sworn, is under oath. Do you understand that?

MR. STERRITT: That is correct.

MR. McGINN: There is another point, before I forget. I think we talked about this off the record and I should make this point at this time. In our answering affidavit to the Board's motion for contempt, we claimed that the additional respondents in contempt were never served. I want to make it clear on the record that we don't contest the jurisdiction of the court and that the allegation that they weren't served will in no way be relied on to contest the jurisdiction of this court. I concede that the additional respondents in contempt are before this court properly. I thought I better state that for the record and I do make that statement for the answering affidavit.

* * * *

to hire another owner-operator and truck to cover both shipping schedules.

Q. Mr. Sterritt, I show you Board's Exhibit 3. Do you recall receiving this check?

A. Yes.

Q. What did you do with it?

A. This is one of the checks we gave to one of the attorneys for representing us in the bankruptcy proceeding. Harvey & Harvey, to be exact.

Q. Did you actually deliver that check to Harvey & Harvey?

A. Yes.

Q. In addition to that $5,000, from time to time you received, especially from the sale of the truck – you received funds from Mr. Law and his Trecho Transport Company, as indicated in Exhibits 1 and 2, have you not?

A. Yes.

Q. Where has that money gone?

A. I have used it to pay taxes and professional fees and other bills pertaining to the non-operating corporations.

Q. Do you recall receiving in the course of these proceedings a notice from the National Labor Relations Board that they were going to have a back pay proceeding?

A. Yes.

Q. That's what you received from the National Labor Relations Board, is that right?

A. I did.

Q. At that time, did you appear in that proceeding, too, in the back pay proceeding?

A. No.

Q. Why?

A. We didn't have the money to pay you.

Q. And at that point what – did you owe anything on the balance at that point, on professional fees?

A. Yes, I believe we did.

Q. What was the balance?

A. It was $5- or $6,000.

Q. And, in fact, have you paid that balance?

MR. DONNELLY: Objection. No foundation has been laid as to the time.

Q. When was it?

MR. DONNELLY: Your Honor, if I might interject, Board's Exhibit 13, that was the Board's supplemental decision and order signed on February